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# In the Supreme Court of the United States.

OCTOBER TERM, 1903.

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LA FAYETTE B. EATON, Appellant and Plaintiff in Error,
*v.*
HARRISON H. BROWN *et al.*
} No. 171.

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**Brief in Behalf of Appellant and Plaintiff in Error.**

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## STATEMENT OF THE CASE.

This case is here on writ of error (and appeal) from the Court of Appeals of the District of Columbia, that court having affirmed the action of the justice who, holding a special term of the Supreme Court of the District for probate business, refused to receive for probate and record the following holographic paper made by the late Caroline Holley as her last will and testament:

"WASHINGTON, D. C. Aug. 31—001.

"I am going on a Journey and may, not ever return. And if I do not, this is my last request. The Mortgage on the King House, wich is in the possession of Mr. H H Brown to go to the Methodist Church at Bloomingburg All the rest of My properday both real and personal to My adopted Son L. B. Eaton of the life Saving Service, Treasury Department - Washington D. C. All I have is my one hard earnings and and I propose to leave it to whome I please.

"CAROLINE HOLLEY."

Mrs. Holley, the decedent, was born in Bloomingburg, N. Y., and came to Washington with her husband, David L. Holley, who was appointed to a clerkship in the Treasury Department August 9, 1880, and who died June 3, 1882. The widow was appointed to a position in the Treasury Department April 14, 1883, and she remained an employe of the Treasury Department until her death, December 17, 1901.

Mrs. Holley, September 1, 1901, the day after she made the above writing, left Washington for a visit to the Buffalo Exposition and other places and returned to Washington September 20, 1901. She was on duty at her desk in the Treasury Department from September 20 to November 27. She left Washington again November 27 to attend the wedding, in New York City, of La Fayette B. Eaton, an event to which she had been looking forward with pleasurable anticipations for nearly a month. She returned to her desk at the Treasury Department December 7, where she remained on duty until December 10, when she was taken sick. She died December 17 at 1313 New York avenue N. W., being at the time over 70 years of age.

During the last two or three years of her life she often said she intended to leave whatever she had to the Methodist church at her old home at Bloomingburg, N. Y., and to La Fayette B. Eaton, a clerk in the Treasury Department, whom she always spoke of as her adopted son. She often said she was under no obligation for anything she had to any of her relatives or kinfolks. After her return from the trip to Buffalo she several times said she had made her will, referred to the will as among her papers, and said it showed how she wanted what she had to go when she died. The only paper of testamentary character found after her death was the one above mentioned—in her own handwriting—carefully preserved in her private and personal desk in her rooms at 1313 New York avenue, N. W. The paper thus preserved was propounded for probate in the Supreme Court

of the District of Columbia by La Fayette B. Eaton, the person named in the paper as the residuary legatee of the decedent; but objection was made to the probate of the paper by Harrison H. Brown and Ira Dorrance, two of the next of kin of the decedent.

Counsel for Brown and Dorrance, who opposed the probate of the paper, desired the judgment of the court on the question as to whether the simple return of Mrs. Holley from her journey into New York and Canada did not of itself, without reference to any other feature of the case, avoid and make null the paper which was offered for probate. They claimed that the paper was conditional on its face, and that the condition on which, as they claimed, it depended (to wit, the death of Mrs. Holley on the journey she was entering upon when see wrote it) having never happened, the paper was not entitled to record; and they wished this question, which, if determined in their favor, would be decisive of the case, to be submitted to the court for determination preliminary to any further proceeding in the matter. With a view, therefore, to ascertaining whether the paper, in consideration of the simple fact that Mrs. Holley returned from the journey she was about to make when she wrote it, was thereby disqualified for probate, they procured, for use in discussing that question, the stipulation which is found on pages 6 and 7 of the printed record. That stipulation made it possible for the court (and that is the purpose the stipulation was intended to serve) to render judgment refusing probate of the paper, if the court should think that the safe return from that journey destroyed the probative value of the paper and should also further think that the paper, in the face of such return, would not be affected, in meaning and legal effect, by proof of the facts alleged in the petition which proposed the paper for probate—such facts, for instance, as those alleged in paragraph 3 of the petition (Rec., p. 2), namely:

"The said Caroline Holley, during the last two or three years of her life, often spoke of its being her intention to leave whatever property she was possessed of at the time of her death to the petitioner, La Fayette B. Eaton, and to the Methodist Church at her old home in Bloomingburg, New York. * *

"And the said decedent, during the last two or three months of her life, often spoke of having made her will, saying that the will was among her papers and that it showed how she wanted her property to go."

All the facts averred in the petition must, of course, be taken as true, and held to be inadmissible to affect the result, before the court is at liberty to refuse probate of the paper, regard being had to the above-mentioned stipulation, and the purpose it was intended to serve, namely, to ascertain whether proof of the paper as a "last request" is admissible despite the fact that the journey referred to in the paper was accomplished in safety.

To state the question presented by the record, in the light of the stipulation, Do the words on the face of the paper constitute a condition (Mrs. Holley having made the journey to Buffalo and returned) which avoids and makes null the paper, no matter what the surrounding facts and circumstances, and no matter what the intention of the decedent as touching said paper may have been, even as declared by herself? Is the construction put by the old lady upon her own piece of testamentary writing, and the place and manner in which she preserved it, to have no effect in the interpretation of it? Is a court to look solely to the fact that a particular journey, anticipated at the writing of the paper, was safely made, and thereupon, shutting its eyes to every other fact, both antecedent and subsequent, declare the paper to be non-probative as the testamentary expression of the decedent?

## Assignment of Errors.

The court erred in refusing probate to the above mentioned paper-writing—

*First.* Because it regarded the words used in the paper about a journey as constituting a "condition," whereas they show only the occasion, motive, or inducement which led to the making of the will at that particular time.

*Second.* Because it regarded that nothing could be allowed to be produced in the way of testimony (the journey having been safely made) which would give to the paper a testamentary character, or which would show that the words used in it did not constitute a "condition."

*Third.* Because it failed to regard that the paper, even if "conditional" in terms, would still, as a will of personal property, be subject to parol or implied revival or republication after the expiration of the "condition."

*Fourth.* The court, having reached the conclusion it did, erred also in imposing costs upon La Fayette B. Eaton, the proponent of the paper for probate. The costs involved in offering the paper for probate and record should not have been assessed upon Eaton personally, but upon the estate left by the maker of the paper.

## Argument for the Appellant and Plaintiff in Error.

The original paper shows a degree of illiteracy in the writer. The punctuation is not always right; the capital letters are not always correctly used; the spelling is at fault in some of the words; the handwriting itself indicates a person to whom penmanship is rather laborious. The work of the decedent in the Treasury Department was that of a counter, and not that of a "clerk" in the ordinary sense of the term. These facts are mentioned to show how wide of the mark we may hit, if we judge of the writing of the decedent as we might if the writer were a skilled dialectitian,

accustomed to use language with full knowledge of the disputes and legal quibbling to which words and phrases may give rise.

The decedent, over 70 years of age, was without children, no relatives near her, her next of kin living in New York, Pennsylvania, and Arkansas, none of them of nearer relationship to her than cousin, and to none of them did she feel under obligation. As said in the paper, "All I have is my own hard earnings and I propose to leave it to whom I please."

The old lady cherished recollections of the church she had attended in years gone by in her childhood home, and she was fond of the young man in the Treasury Department whose life in her old age had touched hers and who, by his kindly attentions, had done so much to brighten and make pleasant her pathway. She speaks of him as her "adopted son."

The vital matter in a question like the one at bar is the intention of the testator. The question is not one which calls for the construction of words with a view to ascertaining what the rights of some third party may be (as, for instance, under a deed or contract) acquired with reference to the meaning of certain words. In such a case the question may very often and properly be, not so much what the writer intended by the words used, as what the words would import in the sense in which ordinarily used. In the case at bar, the decedent having the right of absolute disposition of her property, no one can or could claim an interest, vested or otherwise, contrary to her will. Whatever may be said about rules for the interpretation of language as between other parties, there is, as regards a testator, one leading and controlling rule, to wit, the intent of the testator, called by Chief Justice Marshall in Finley *vs.* King's Lessee, 3 Peters, 377, "the cardinal rule in the construction of wills."

Is the writing here offered for probate one which Mrs.

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Holley left as embodying her "last request," or is it a paper which she intended should be operative only on condition she did not return from her Buffalo trip? The courts are slow to regard a testator as having hung his will upon a condition unless his intention to do so is plainly and unequivocally manifest, as may be seen from some of the adjudicated cases. Notice, for instance, the conditional expressions "about to start upon a long journey" and "in case I do not return," used in Bradford *v.* Bradford, decided by the Kentucky Court of Appeals, May 19, 1883. The case is cited in Likefield *v.* Likefield, 82 Ky., 595, and is reported in 4 Ky. Law Reporter, 947. The prefatory words to the will were as follows:

"Being in the full possession of all my mental faculties but in feeble health, and *about to start upon a long journey*, and subject to the common casulties of others, I deem it prudent to provide for the disposition of my property *in case I should not return*," &c., &c.

The testator made the journey, returned home, and lived for several years thereafter. The Court of Appeals say, 4 Ky. Law Reporter, 948:

"It is contended that the words, 'in case I should not return,' rendered the instrument contingent, and, as he took the journey and returned without casualty, it is void and inoperative as a testamentary paper.

"Those words do not constitute a condition upon which the will is dependent. In connection with the other words quoted, they simply set forth the circumstances which induced him to make his will before his departure for fear he might never return. The supposed condition is alone connected with the motive and reasons for the prudence he deemed it his duty to exercise, and it is evident he did not intend to say, 'in the event I do not return, then I make the following disposition of my property or wish it disposed of in a particular mode,' but that he had doubts of his return,

which arose from his physical condition, the long journey he was about to take, and the casualties which so often occur to travelers, and for these reasons he absolutely disposed of the whole of his estate without any conditions whatever. Although he returned and lived several years afterwards he preserved the paper, and it was found after his death in his drawer amongst his private papers. This fact, while not amounting to a statutory republication, shows that the testator believed republication unnecessary and was satisfied he had disposed of his property, and did not look upon the paper as void because he had returned."

In Likefield *v.* Likefield, decided by the Kentucky Court of Appeals February 28, 1885 (82 Ky., 589), the piece of testamentary writing was the following:

"LOUISVILLE, *January* 14, 1859.

"If any accident should happen to me that I die from home, my wife, Julia Ann Likefield, shall have everything I possess, the house and lots and the money that is due to me, and for her to hold it as her own.

"WM. A. LIKEFIELD."

William A. Likefield did not die away from home, but died at home March 28, 1881, over 22 years after making the above writing. The Court of Appeals say, 82 Ky., 591:

"The rule is, that courts will not incline to regard a will as conditional if it can be reasonably held that the maker was simply expressing his inducement to make it, however inaccurate the language may be for that purpose, if strictly construed; and, unless the words clearly show that it was intended to be temporary or contingent, it will be upheld."

Again, page 592:

"The end to be assiduously sought is the *intention* of the testator, and all rules must be subordinated to it" (the intention of the testator).

And on page 594:

"It is quite natural for a person to give some reason for making a will, and, as has been well said, a 'close and literal interpretation may very easily carry us wide of the intention.'"

And on page 595:

"While the word *if* is an apt one to express a condition, yet the language used is so general in character that it shows the testator intended it as words of *inducement* to the making of the will only, and not that the disposition of his property should depend merely upon the place of his death."

Notice also the Court of Appeals of West Virginia in French *v.* French, 14 W. Va., 459. The piece of writing in that case was holographic, of the following tenor:

"Let all men know hereby, if I get drowned this morning, March 7, 1872, that I bequeath all my property, personal and real, to my beloved wife Florence.

"Witness my hand and seal, 7th of March, 1872.

"WM. T. FRENCH."

When French did the above writing his wife was trying to persuade him not to make that morning a trip which involved the fording of a swollen stream near his house. French was not drowned that morning, nor did he die until December 29, 1874, nearly three years afterwards.

The Court of appeals say, 14 W. Va., 499:

"It seems that it is now an established principle that, while a person may make a conditional will, his intention to do so must appear clearly.

"The question is, whether the contingency is referred to as the reason or occasion for making the disposition, or as the condition upon which the disposition is to become operative."

And on page 502:

"The language can be reasonably interpreted and construed to mean that he refers to the calamity, and the time during

which it may happen, as the reason for making said paper-writing, and not as the condition upon which the disposition of the property is to become operative; and the will should be interpreted as though it read, 'Lest I get drowned this morning; or lest I die this morning.'"

The following piece of writing is found *in re* George Thorne, as reported in 4 Swabey and Tristram, 36:

"CAPE COAST CASTLE, GOLD COAST,
"*2nd of November, 1863.*

"Be it known to all concerned: I request in the event of my death while serving in this horrid climate, or any accident happening to me, I leave and bequeath to my beloved wife, &c., &c.

"I consider that every person should be prepared for the worst, and particularly in such a treacherous climate as this, which is considered one of the worst in the world, which has compelled me to write this letter.

"GEORGE THORNE."

Thorne, who was a soldier, did not die on the Gold Coast, but in London, September 16, 1864. The court, concerning the instrument, says, page 38:

"I have read this paper over very carefully and I think it is not necessary to limit its operation to the event of death while on the Gold Coast."

And *in re* Dobson, Law Reports, 1 P. & D., 88, we have the following:—

"January 29, 1863. Thursday morning. In case of any fatal accident happening to me, being about to travel by railway, I hereby leave all my property to" &c., &c.

The writer of the above returned unhurt from the travel by railway, and died November 21, 1865. The court, in admitting the paper to probate, says, page 89:—

"The testator's meaning seems to me to have been this: 'My mind is drawn to the consideration that all railway traveling is attended with danger, and therefore I think I had better make my will.'"

In *ex parte* Lindsay, 2 Bradf. (N. Y.), 204, we have the case of a woman living in New York who on the eve of a trip to St. Louis wrote the following:

"SEPTEMBER 1, 1851.

"According to my present intention, should anything happen me before I reach my friends in St. Louis, I wish to make a correct disposal of the three hundred dollars now in the hands of Mr. Harrison, bearing interest for me. Of this I leave," &c., &c.

The woman made the trip without accident and returned to New York, where she died in December, 1851. Concerning the probate of the paper we quote from the opinion of the court as follows:

On page 206:

"The question necessary to be determined in this class of cases is, whether the words clearly express a contingency upon which the instrument is to take effect, or whether they may fairly be interpreted as indicating the cause or occasion of making the will."

And on page 209:

"The will is inartificially drawn; and, where language is employed without exactness or precision, close and literal interpretation may very easily carry us wide of the intention."

In Skipwith *v.* Cabell, 19 Grattan, 758, the testatrix, at the end of the second codicil, had written as follows:

"AUGUST 18, 1861.

"In case of a sudden and unexpected death, I give the remainder of my property to be equally divided between my

cousin, Dr. Carter, of Philadelphia, and my cousin, Peyton Skipwith, of New Orleans, one half of which each must hold in trust for the benefit of his children."

The testatrix did not die either suddenly or unexpectedly, and it was thereupon contended that the above bequests were conditional. The court expressed itself as follows, page 784:

"We can understand the language as designed only to express the reason which led the testatrix to dispose of the residue at that time, and to avoid the risk of further delay," adding, "The bequests were absolute and not conditional."

In Cody *vs.* Conly, 27 Grattan, 313, we have the following paper written by a man over in Fairfax County, Virginia, who, owing to the troublous times brought on by the presence of hostile troops, thought he would leave that section until the return of better times:

"LEWINSVILLE, *August* 19, 1862.

"DEAR WIFE: I am going away; I may never return. I leave my property to Gaines and Dan; dispose of it as you see fit; don't forget Sister Mary and Bridget. Pay William McCauley $20, Patrick Sullivan $25.

"EDMUND C. CONLY.

"Witness, SAMUEL FARNSWORTH."

But Conly never went away and continued to reside in Fairfax County until his death in 1868. It was contended that the above paper was conditional; and the court, on the subject of conditional wills, expressed itself as follows, pages 820–1:

"The cases on this subject show that while a person *may* certainly make a conditional will, his intention to do so must appear very clearly on the face of the will; and, if such an intention do not so appear, the will must be regarded as unconditional. Indeed, in some of the cases the form of ex-

pression was conditional, and yet the construction of the will was otherwise."

In Thompson *v.* Connor, 3 Bradf. (N. Y.), 366, the decedent left the following testamentary declaration:

"I give and bequeath to my cousin, Margaret Baxter, * * three hundred dollars, deposited by me in the Seamen's Bank for Savings, New York, August 31, 1849, the bank book, numbered 20,516, being in my hands, and whatever interest may accrue thereon, this gift and bequest being subject to the following condition, viz., that the said Margaret Baxter shall produce from the officers of the ship in which I shall sail on my next cruise satisfactory evidence of my decease during the same." * *

At the time the decedent executed the above paper, October 20, 1849, he was in contemplation of a voyage to sea from which he subsequently returned, and died in New York City in September, 1855. There was evidence of the recegnition of the will by the decedent shortly prior to his death; and the surrogate in decreeing probate of the paper said, page 368:

"Doubtless the possibility of death during the contemplated cruise was considered, and led to the incorporation of the condition in the will; but then the condition refers primarily to evidence, or, in other words, he does not give only upon condition he should die during that voyage, but that certain specified proof of his death should be produced. In this view we might read the condition as based entirely upon the contingency of decease upon a particular cruise, on the happening of which, the condition would become operative, and on the non-occurrence of which the condition would fall. The testator not having died on that cruise, there was no evidence required (from the officers of the ship), and that was an end of the condition. If the testator in this clause of the will is to be understood as saying, 'If I should die upon my next voyage then this will is made on condition that the legatee shall produce from the officers of the ship in which I

shall sail satisfactory evidence of my decease,' this would not make the will conditional. * * * To make a testament strictly depend upon a condition so as to affect the question of probate, the intention ought to be very clear that the will should *not* take effect except upon the prescribed contingency. The mere *factum* of the instrument implies generally an intention not to die intestate—a determination to give and bequeath—and if the condition is not annexed to the substance of the gift, but only to some collateral matter, such as payment on proof of death, then the gift will be absolute and not conditional, and the condition will be left to operate on the occurrence of the contingency contemplated by its terms. * * I think that the condition fell by reason of the event not happening to which it was attached, and that the gift was consequently unaffected."

Let us recur now to the piece of writing in the case at bar. The old lady (Mrs. Holley) tells the occasion which prompted her to write down her "last request" at the time she did. "I am going on a journey and may not ever return." She had often spoken of what her "last request" would be, but she had never written it down before, and now, on the eve of that journey, and its possibilities, she writes down what she calls "my last request." She was "*inops consilii*" at the time and had probably never in her life consulted a lawyer. She says: "I am going on a journey and may not ever return." These words do not bring us squarely to the point of death—the event which is before us when we say, "This is my last request." The old lady continues and alludes to death, the occurrence with reference to which she wishes to say, "this is my last request." And see how she does it. "And if I do not" return. To that hypothetic, not to say, euphemistic, mention of death, she appends her "last request." The request itself is absolute, not one word or syllable in it suggestive of a change in disposition, if written at another time or under other circumstances. The motive is set forth which induces her to write at the time she

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does, namely, the journey that is before her and the possible event that may happen in connection with it. Except for such possibilities, liable to happen at any time, there would be no occasion on the part of any one to make wills. Mrs. Holley, instead of referring to death in the abstract (as a legal draftsman might have done had she used one), refers to it in connection with a particular event just then before her—a journey full of uncertainty to her at her time of life; and the possibility of not returning from that journey comes over her and moves her to write down what, in the ordinary routine of her life, she had neglected to do theretofore, but which is now borne in upon her as she meditates on the eve of her long journey. What did she know of hypothetic or conditional phrases, and the possibilities that might lurk within them of conjuring up legal "conditions," to be made to appear as integral parts of her "last request," as she was then writing it down? Isn't her expression, the prefatory words, as she uses them, just a delicate euphemism such as we often hear from persons when they have occasion to refer to death? Instead of speaking plainly and pointedly, they say: "If I shouldn't be here," "If anything should happen to me." We are slow to put ourselves directly face to face with that dread event. We make sidewise and indirect allusions, enough to indicate the possibility, but hesitate to embrace the event in plain words. That the only uncertain or contingent thing in the mind of Mrs. Holley at the time she was writing this paper was whether or not she would die on that trip, is shown by the manner in which she preserved the paper and afterwards spoke of it. The contingency in her mind was the time of death, not the terms of her "last request." The fact that, before ever she had thought of going to the Buffalo Exposition, she had often expressed her purpose to leave what she had to the parties named in this paper, shows that the journey and the possibility that she might not return from it, was merely the cause of her writing

down her "last request" at the time she did, the same as though she had said: I make this my last request now, because I may not ever return from the journey I am now going upon.

A contingency, expressed with a view to the time of death, ought not, by any species of legerdemain in either grammatical or legal construction, be made to refer to the testamentary act itself. No higher evidence as to what Mrs. Holley meant by this paper could be adduced than her own words and conduct concerning it. In it she makes a conditional reference to death, but her subsequent recognition and preservation of the paper show that she had no thought of the condition as attached to the "request" itself.

Mr. Schouler very justly says in his work on Wills (Ed. 1900, Sec. 290, p. 297):

"It is held with good reason that the surrounding circumstances of the execution may be shown to aid in ascertaining the true interpretation of the will. Such proof may aid in determining, for instance, whether the testator merely had a particular peril or exposure in view, or, what is more improbable, meant that its effect should depend wholly upon death from that peril or exposure, and * we see no reason why the very circumstance that the will in question has never been cancelled, but is produced from proper custody on the testator's death and presented for probate, may not be adduced in favor of its intended validity. * For, after all, conditional wills are of so peculiar a description, and operate usually so disastrously, not to say senselessly, that any doubt should be resolved in favor of absolute character and a probate."

Again, the court below, in rejecting the paper offered for probate, disregarded the fact that a recognition of this paper by Mrs. Holley as her will after her return from the Buffalo Exposition could have the effect of reviving or republishing it as her will, even if it were a paper which had failed by reason of her return. Implied republications have always been permitted as to wills of personalty when there was

no statute prescribing a formal execution for such wills. The Statute of Frauds in England (29 Car. 11) made it necessary that republication of wills, as to land, be as express and formal as the original execution, of which the attestation of witnesses was an essential part; but wills of personal property continued capable of informal execution and hence of informal and implied republication; so informal, indeed, were such wills, as to execution, that, as said by Blackstone, they needed no witnesses, and not even the testator's own signature, if only the testator be shown to have written the will or caused it to be written; and such wills continued, as before, capable of informal republication. Indeed, a devise of land, prior to the Statute of Frauds, permitted of a parol revival; and such revivals or republications continued in England, as to wills of personalty, until 1837, when the Wills Act (1 Vict., ch. 26) prescribed the same formalities for wills of all kinds of property. The law, thus changed for England in 1837, remained in force in this District until January 1, 1902, when the Code become operative, under which, as in most of the States, the same formalities apply to all wills, whether they affect real or personal property.

That mere parol acts and declarations by a testator could reestablish and republish a will, as to personalty, under the Statute of Frauds, as it existed in England until 1837 and in this District until 1902, see the following cases, some of them showing such a republication as to land, anterior to the statute:

Miller *v.* Brown, 2 Haggard's Ecc. Rep., 209.
Braham *v.* Burchell, 3 Addams' Ecc. Rep., 243, 264.
Long *v.* Aldred, 3 Addams' Ecc. Rep., 48.
Brotherton *v.* Hellier, 2 Lee's Ecc. Cases, 55, 83–84.
Slade *v.* Friend, cited in Brotherton *v.* Hellier, 2 Lee's Ecc. Cases, page 84.
Beckford *v.* Parnecott, 2 Croke's Eliz., 493.

Cotton *v.* Cotton, Freeman's Reports, 264.
Anon., 2 Shower, 48.
Cotton *v.* Cotton, cited in Alford *v.* Earle, 2 Vernon, 209.
Bateman *v.* Pennington, 3 Moore's P. C. C., 223.
Strauss *v.* Schmidt, 3 Phill. Ecc. Rep., 209.

In Beckford *v.* Parnecott (2 Croke's Eliz., 493) the testator had devised "all his lands in Aldworth to Barbara and Joan, his daughters," and made them his executrixes. Subsequently to the making of that will he bought additional land in Aldworth. A person having offered to buy these additional lands, the testator said, "No, they shall go with my other lands in Aldworth, to my executrixes." Held a republication of the will so as to pass the after-acquired land.

In Cotton *v.* Cotton (Freeman's Rep., 264) the testator devised all his land to his wife, and, after the making of that will, purchased other land. To a party who desired to buy these newly-acquired lands, he said:

"No, for I have made my will and settled my estate and intend that my wife shall have my whole estate."

Held a republication so as to make the will embrace the subsequently-acquired land.

In a case reported anonymously in 2 Shower, 48, it is said:

"In a trial at the bar upon an issue directed out of chancery, concerning the republication of a will, it was resolved by all the courts that these words, 'My will in the hands of J. S. shall stand' amount to a republication."

In the case of Alford *v.* Earle, as reported in 2 Vernon, it is said on page 209:

"The case of Cotton *v.* Cotton cited, tried in the Common Pleas before Lord Chief Justice North, where the testa-

tor's saying his will was in a box in his study, amounted to a new publication."

In Brotherton *v.* Hellier (2 Lee's Ecc. Cases, 55, 83-84) the will when produced was found to be cancelled, but it was doubtful whether the cancellation had been made by the testator. However, the testator had given directions to his solicitor for the making of a codicil, which had been drawn by the solicitor and turned over to the testator for execution, but the testator, desiring to keep his wife, who watched him in his sick chamber, ignorant of what he was doing, died before he had signed the codicil. Held that the will was revived, even if the cancellation had been by the decedent.

In Slade *v.* Friend, cited at page 84 in Brotherton *v.* Hellier (2 Lee's Ecc. Cases) the will was in a trunk, of which the testatrix kept the key, and, being asked on her death bed whether she had made a dispositon of her affairs, she answered, "Yes," and pointed to the trunk. Held a revival of the will, though the will itself seemed to have been cancelled by having lines drawn over the testatrix's name.

In Miller *v.* Brown (2 Haggard, 209) the will, which purported to dispose of real and personal property, was made by a woman during coverture. Her husband died December 16, 1825; she died September 11, 1827. In June, 1827, she had delivered to one of the persons named as executor a tin box which she informed him contained her will (and in which the will was found after her death) and, in the evening of the same day on which she had so delivered the tin box, she had said to the father-in-law of the executor (Dr. Chichester) that 'she had that day deposited her will with him' (the son-in-law). The Court say, page 210:

"It has been said that it is necessary to show a republication after the husband's death, *animo republicandi*. It would be a strange doctrine for this court to hold that a formal republication is necessary for a will of personalty where no

publication is necessary. Custody is a sufficient publication of personalty. Dr. Chichester speaks to a very strong act of recognition, which, as far as concerns this court, is a sufficient republication. The deceased (within three months of her death) brought the will, sealed up and deposited in a tin box, which she delivered to one of her executors for safe custody, and so it remained till her death, and was then found.

"This is a republication to all intents and purposes, and the instrument so delivered becomes a new will. There cannot be the slightest doubt as to what her mind and intention were. She did not consider a formal republication necessary, but she adhered to the disposition.

"What effect this paper may have upon the real estate it is not for this court to determine, but it is clear that the executors are entitled to a general probate."

In Braham *v.* Burchell (3 Addams' Ecc. Rep., 243, 264) the testator (a woman) had died in August, 1817, leaving a will of date August 10, 1797. In March, 1784, she had married at Vienna, but had lived with her husband only a year, when she returned to England and resumed her maiden name. Her husband died in Ireland in 1805. Among the averments made in the paper propounding the will for probate was the following, page 244:

"That the deceased duly made and executed her last will and testament bearing date the 10th of August, 1797; that a few days before her death she, the deceased, recognized her said will, saying, that 'she had made her will and that it was to her satisfaction;' that shortly after her death the said will was found in her bureau, among other papers of moment and concern."

The recognition referred to in the allegation thus made was when the attending physician asked her (page 264) whether she had her matters arranged and she answered, "I have made my will." The physician then asked a second question, whether the will was to her satisfaction. She answered "Yes." But the above will was not present at

the time, nor described as to date or place of deposit. Indeed, the contestants of the above will claimed her words had reference to another will, but they did not show the existence of any other. The Court says, page 264:

"We all know that if a wife makes a will, being intestable at the time of the will making, still if, surviving, she approves and confirms (in a word, republishes) that will after the death of her husband, it is a good will. Now, that the deceased, if there be no other will in question, did approve and confirm (in effect, republish) this will, is indisputable. The mere conservation, for so many years, of this will, in connection with its place of deposit, may so evidence adherence to, and approval of, this will as to amount to a republication of it, for anything that I am prepared to say to the contrary. But, however this be, her repeated and even solemn declarations, to which I have already adverted, if applicable to, are clearly a virtual republication of this will."

In Long *v.* Aldred (3 Addams' Ecc. Rep., 48) the will was executed by a widow April 12, 1813. She afterwards married and her husband died June 15, 1819. She died June 9, 1820. In March, 1820, while ill in her room, she directed the nurse to bring her a mahogany box, in which she kept her papers, for the purpose of taking from the box her marriage bond, and, while looking over the papers, said: "Nurse, this is my will." The nurse, noticing the condition of the paper, remarked that it was "rat-eaten and couldn't be read." The testatrix said, "the roaches have done it," and started to read the paper, saying she had been asked to change the will but that she had no desire to do so. Some one coming in at the time, she desisted from further reading and said nothing more about the paper. As to the above averments, set forth in the petition which offered the paper for probate, the Court says, page 52:

"The facts and circumstances pleaded in the third and fourth articles of the allegation, would, if proved, clearly

amount to a republication of the will so far as respected her *personal* estate."

The allegations were thereupon (as stated in a note to the case) admitted to proof, and, being proved, the will was admitted to probate.

The case of Bateman *v.* Pennington (3 Moore's Privy Council Cases, 223) will also show the propriety of receiving parol testimony to the point of ascertaining the intent of the testator with reference to the paper. In that case the body of the paper (in the handwriting of the testator) was written in ink, but the date was inserted in pencil and the signature of the testator was likewise in pencil, preceded by the following words, also in pencil: "In case of accident I sign this my will."

There was also a clause of attestation, but without the subscription of any witnesses. The proponents of the paper had averred the intention of the decedent to die testate, and also his sudden death, but the lower court had refused proof, regarding the words of the paper as deliberative only, and not final, that being the presumption afforded by the condition of the instrument itself. The court, speaking by Lord Brougham, page 228:

"Their Lordships are of opinion that the sentence of the court below, rejecting the allegation, ought to be reversed, and that the appellant must be admitted to his proofs."

In the case of Strauss *v.* Schmidt (3 Phillimore's Ecc. Rep., 209) the testator had written a couple of letters telling how he wished his property to go "in case I should die on my travels." He returned from the continent and lived in England several years before his death. One of the letters had been delivered sealed to his bankers with direction to open as soon as they should hear of his death. The letters were propounded for probate in an allegation that they contained

the last will of the deceased. The question was as to whether the decedent had so recognized the papers after his return from traveling as to establish their testamentary effect, despite their conditional terms. The Court says, page 216:

"The deceased was a German, who had resided fourteen years in England. * * * He was not only a foreigner, but he was ignorant of our laws. His expressions, therefore, are not to be construed too strictly. The court is to look as much as possible to the intention. * * * These two papers together are admitted to be testamentary papers, which would have operated had his death taken place during his absence from England. He was fourteen years absent.

"Courts, however, are cautious how they construe conditions of this sort. * * * If, on the return of the deceased in 1802, by subsequent acts he has recognized these papers, I should not hold his return to be such a defeasance as to invalidate the will. If he had returned, and taken no notice of the paper, his silence would have put a construction on it. If, on the other hand, his conduct shows that he was mindful of it, the court is bound to carry his intentions into effect. * * * This is a direct recognition of the existence of a letter which was not to be opened till after his death; he goes on recognizing this direction; he keeps the disposition alive. * * * I think the deceased did not consider his return to this country as a revocation. These circumstances show that he regarded these letters as important—which were to direct the disposition of his property—and, therefore, I think the court is warranted in admitting this allegation to proof."

When statutes prescribe the manner in which wills shall be authenticated or republished (and the statutory formalities required for such writings have come within recent years to be in most places the same for both real and personal property), they have the effect of crystallizing the piece of writing, rendering it rigid and impervious, not to be affected by subsequent parol testimony. Under such statutes, the probative or testamentary character of the paper is fixed by

the act of execution, and parol testimony becomes inadmissible to affect such character, if inconsistent with what the statute requires as necessary to create the testamentary character. Under such statutes, if the will be conditional, the act necessary to revive or republish it after failure of the condition, must be such, of course, as the statute has prescribed for that purpose, generally the same as for an original publication. We need to consider the statute law which affected the case when we read decisions in which the court declined to receive subsequent parol declarations to the point of the testamentary character of the paper.

The will in the case of Parsons *v.* Lanoe, 1 Vesey, Sr., 190 (a case upon which the court below in its opinion, Rec., pp. 12–13, seems to lay stress as a leading case), was considered by Lord Hardwicke with reference to real estate between which and personal property there was at that time, as to wills, a wide difference in the state of the law, and that difference continued in England until 1837.

The case of Roberts *v.* Roberts, 8 Jurist, N. S., 220, is an illustration of the change made by statute in the law as it touches personal property. In Roberts *v.* Roberts, it was held that the paper, conditional in terms, could not be made operative by parol declarations of the deceased after his return from Wales, but that a revival must be in accordance with the provisions of the statute 1 Vict., c. 26. The Court says, page 221:

"There was evidence of adherence, but Mr. Pritchard (the counsel opposing probate) contended that such evidence could not be admitted, since the statute 1 Vict., c. 26, to establish the will. It appears to me his argument is well founded. The act of preserving the will can not carry the case further than a parol declaration concerning it; but, if the will in terms is conditional, the deceased could not by any parol declaration alter it. All the cases cited were decided before the statute 1 Vict., c. 26. In principle it is like

the case of a will made by a married woman without the consent of the husband. Before the statute such a will might be established by a parol recognition after the husband's death, for it was considered a republication, but no such operation can be given to it now. In Parsons *v.* Lanoe, Lord Hardwicke said, 'The penning of the will being so (*i. e.*, conditional), collateral or parol proof cannot be taken into consideration, for that would be dangerous, and what the court, since the Statute of Frauds, is not warranted to do; for nothing will set it up but some act done by him after that event to republish the will or defeat the condition.' In that case the question arose under the Statute of Frauds in relation to real estate; but since the statute 1 Vict., c. 26, the same principles are applicable to wills of personal property. For these reasons I feel bound to pronounce against the document propounded."

It is thus observable that the principle of the judgment in Parsons *v.* Lanoe did not apply to a will of personal property until the two kinds of property, real and personal, were put upon a parity, as to wills, by the statute of 1837 (1 Vict., c. 26). Indeed, as showing the tendency of the courts, even when statutes have supervened, to give effect to a testator's intention, despite the use by him of unfortunate phrases that would seem to import a condition defeative of the will, see the case of the Goods of Mayd, Law Reports, 6 Probate Division, page 17, decided in 1880. The paper in that case was the following:

"EULBERTIE STATION, COOPER'S CREEK,

"QUEENSLAND, 23d *August*, 1878.

"On leaving this station for Thargomindah and Melbourne, *in case of my death on the way*, know all men this is a memorandum of my last will and testament," (setting forth the bequests) and the paper was duly executed as a will. The court, page 18:

"The meaning of general phrases of this kind is, 'knowing the uncertainty of human life, and being about to enter on something particularly dangerous, I make this my will,'

and the court ought not to scrutinize such expressions with too great nicety."

When statutes have not intervened to put wills, as affecting personal property, upon a different footing than they occupied in the District of Columbia prior to January 1, 1902, parol or extrinsic evidence is receivable, either for the purpose of showing a republication of the will, or for the purpose of showing the *testamentary character* of the paper. The plaintiff in error does not want to change, vary, add to, or contradict, in any respect, the will of the decedent. He simply avers himself ready to show, by parol testimony if need be, that the paper he propounded for probate is the last will and testament of Caroline Holley. Did Caroline Holley make and cherish that paper as an unconditional declaration of her "last request"? When the thing under consideration is the *probative character* of the paper (not its testamentary construction) how can we better get at the mind and attitude of the testator—the testamentary mind and intent—than by a resort to evidence extrinsic to the paper itself?

The question, under this aspect of the case, is, not what this, the last will of Caroline Holley, *means*, but is this the *last will* of Caroline Holley? Did she intend this paper to set forth her "last request"? To ask such questions is to show the propriety of getting back to Caroline Holley and ascertaining what her idea was and whether she intended this paper to hang upon the contingency of her dying at a particular time.

As to the fourth error assigned: It can hardly be the law that a person who would bring to the attention of the court a paper of the character of the one under consideration must do so at his personal peril. Mrs. Holley had the right to leave her own "hard earnings," as she calls them, to whom she pleased; and, if she left a paper telling her pleasure in that

regard, it is the function of the law to see that her wishes are carried out. And surely the person who, in the utmost good faith, tenders to the court a paper which he thinks embodies the "last request" of the old lady is not to be amerced as for a false clamor, even if the court should feel itself obliged to say that Mrs. Holley was so unfortunate as not to have expressed her "last request" in legal form—neither the paper itself nor the paper as supplemented by her oral statements being sufficient to give effect to her intentions. Under such circumstances the expense of inquiring as to the sufficiency of her words in law to make known her wishes ought of course to come out of the property left by her, held by the court pending inquiry as to the legal owner.

Indeed, the Court of Appeals of the District, in Tuohy v. Hanlon, 18 D. C. App., 225—a case in which an executor for defending a will was allowed out of the estate even his reasonable counsel fees, though his defense of the will was unsuccessful against the caveat—said, page 232:

"It may be questioned whether he (the party named in the will as executor) can, of his own accord, and without the permission of the court, turn back after he has filed his petition. Nor is it apparent how any good purpose could be subserved if he then turned back. The will is then in court; it has been propounded for probate; it must be disposed of in some way before any letters of administration are granted to any one. The withdrawal of the executor named could only result in the appointment of some one else to conduct the contest."

The plaintiff in error in this case, being the residuary legatee under the paper offered for probate, stood in exactly the same situation, under the law, as though he had been named executor in the paper. The statute in force at the time the paper was filed for probate was the following (Sec. 63 of Abert's Comp., page 16):

"If letters of administration are to be granted, with a copy of the will annexed, and there be a residuary legatee or legatees in such will, he, she, or they shall be preferred to all, except a widow, and it shall be incumbent on the court to proceed, in the manner hereinbefore directed with respect to executors within the District, before administration shall be granted to any other person."

It was the duty, as well as the right, of La Fayette B. Eaton, the appellant and plaintiff in error in this court, acting in good faith, to present to the court below the paper which has been put in contest and to act in like manner as if he had been named executor, and it was error in the court below to tax him personally with the costs of the contest. No application to the court below for counsel fees out of the estate was made by the proponent of the paper.

It is probable that no one (in the face of Ormsby *v.* Webb, 134 U. S., 47; Campbell *v.* Porter, 162 U. S., 478; and Kenaday *v.* Sinnott, 179 U. S., 606) would question a writ of error as the proper proceeding on which to bring before this court for review a judgment of the Court of Appeals of the District of Columbia in a matter involving the probate of a will; but, through abundance of caution, the plaintiff in error herein prayed for and was allowed an appeal in this cause along with the writ of error (Rec., pp. 16–18).

J. ALTHEUS JOHNSON,
JOSEPH A. BURKART,
*For the Appellant and Plaintiff in Error.*